

NEGOTIATING EFFECTIVE TEAMING AGREEMENTS

Ralph C. Thomas III
NASA Associate Administrator
for Small and Disadvantaged
Business Utilization
Washington, D.C.

NASA/JPL 12TH Annual High-Tech
Small Business Conference 2000
Sheraton Industry Hills Resort Hotel
City of Industry, CA
March 6, 2000

I. WHAT IS A TEAMING AGREEMENT?

- “AN ARRANGEMENT PURSUANT IN WHICH
 - (a) TWO OR MORE COMPANIES FORM A PARTNERSHIP OR JOINT VENTURE TO ACT AS A POTENTIAL PRIME CONTRACTOR; OR
 - (b) A POTENTIAL PRIME CONTRACTOR AGREES WITH ONE OR MORE OTHER COMPANIES TO HAVE THEM ACT AS ITS SUBCONTRACTORS UNDER A SPECIFIED GOVERNMENT CONTRACT OR ACQUISITION PROGRAM”

FAR 9.60 1

I. A TEAMING AGREEMENT IS NOT (CONTINUED)

- A TEAMING AGREEMENT IS **NOT** A SUBCONTRACT

PRIME
SUB

TEAMING AGREEMENT
VENDOR 1, VENDOR 2

- BUT IT COULD BE A GUARANTEE OF A SUBCONTRACT

II. THE PURPOSES OF TEAMING

- A. NEED
- B. SUBCONTRACTING GOALS
- C. CONTRACT BUNDLING
- D. GOVERNMENT INSISTENCE
- E. PRIME CONTRACTOR'S PERSPECTIVE
- F. SUBCONTRACTOR'S PERSPECTIVE

III. CHOOSING THE STRUCTURE OF THE RELATIONSHIP

- A. JOINT VENTURES
- B. DUAL PRIME CONTRACTORS
- C. PRIME/SUBCONTRACTORS

IV. CHOOSING THE TEAMMATE

- A. WHAT IS THE INTEREST DRIVEN BY
- B. HOW TO MAKE YOURSELF AN ATTRACTIVE POTENTIAL PARTNER
- C. CHECK THE PRIME OUT
- D. *BUT DON'T TALK TURKEY WITHOUT AN ADVANCE
CONFIDENTIALITY AGREEMENT

V. ADVANCE CONFIDENTIALITY AGREEMENT (ACA)

- A. HAVE ONE, USE ONE
- B. GET IT SIGNED
- C. NEVER START DISCLOSING INFO UNLESS IT IS SIGNED

V. ADVANCE CONFIDENTIALITY AGREEMENT (ACA) (CONTINUED)

- DEFINITION: THE TREATMENT OF PROPRIETARY DATA DURING THE PERIOD WHEN THE PARTIES ARE EVALUATING WHETHER TO FORM A TEAM
- A SUBCONTRACTOR SHOULD SEEK AN ACA BEFORE ANY NEGOTIATIONS REGARDING A TEAMING AGREEMENT HAVE BEGUN
- IF NOT, PRIME CONTRACTOR COULD REFUSE TO ENTER INTO A T.A. AND STILL USE SUBCONTRACTOR'S IDEAS, CONCEPTS AND OTHER INFORMATION FOR ITS OWN UNILATERAL BENEFIT
- BE PARTICULARLY WARY OF PARTICIPATING IN ANY NEGOTIATIONS WITH A PRIME CONTRACTOR THAT INSISTS UPON THE DISCLOSURE OF THE SUBCONTRACTOR'S PROPRIETARY DATA BEFORE PARTIES HAVE EXECUTED AN ACA

VI. EXCLUSIVITY VS. NON-EXCLUSIVITY

A. THE PRIME CONTRACTOR PERSPECTIVE

B. THE SUBCONTRACTOR PERSPECTIVE

C. PRACTICAL IMPLICATIONS OF NON-EXCLUSIVE AGREEMENTS

VII. INTENDED EFFECT OF AGREEMENT

- A. AGREEMENT TO NEGOTIATE IN GOOD FAITH
- B. AGREEMENT TO AGREE
- C. ABSOLUTE DUTY TO PLACE SUBCONTRACT

VII. INTENDED EFFECT OF AGREEMENT (CONTINUED)

- SOME PRIME CONTRACTORS WILL SEEK PROVISIONS WHICH INCLUDE:
 - MAKING SUBCONTRACTS “SUBJECT TO MUTUAL AGREEMENT”;
 - INCLUDING REFERENCES ONLY TO “A SUBCONTRACT” OR AN “INITIAL SUBCONTRACT”;
 - IN A MULTI-PHASE PROCUREMENT, EXPRESSLY REFERRING ONLY TO FULL SCALE DEVELOPMENT (“FSD”) OR LOW RATE INITIAL PRODUCTION (“LRIP”) SUBCONTRACTS

VII. INTENDED EFFECT OF AGREEMENT (CONTINUED)

- PROVIDING FOR TERMINATION OF THE AGREEMENT IF NEGOTIATION AND EXECUTION OF A SUBCONTRACT ARE NOT CONCLUDED WITHIN A SPECIFIED PERIOD AFTER PRIME CONTRACT AWARD.
- PRECLUDING THE RECOVERY OF CONSEQUENTIAL OR INCIDENTAL DAMAGES FOR BREACH; AND
- PROVISION FOR THE EXPIRATION OF THE AGREEMENT UPON AWARD OF A SUBCONTRACT

VII. INTENDED EFFECT OF AGREEMENT (CONTINUED)

SUBCONTRACTORS SHOULD INSIST ON INCLUDING PROVISIONS...

- OBTAINING AN UNQUALIFIED COMMITMENT BY THE PRIME CONTRACTOR TO “PLACE” SUBCONTRACTS WITH THE SUBCONTRACTOR;
- IDENTIFYING THE SPECIFIC PHASES OF THE PROGRAM TO WHICH THE AGREEMENT APPLIES, E.G., FSD, LRIP, VOLUME PRODUCTION

ALTERNATIVELY, SPECIFYING THE PERIOD WHICH THE AGREEMENT WILL APPLY, E.G., IMPOSING A DUTY TO PLACE SUBCONTRACTS UNDER ALL PRIME CONTRACTS AWARDED WITHIN A SPECIFIED PERIOD FROM THE DATE OF THE AGREEMENT.

VII. INTENDED EFFECT OF AGREEMENT (CONTINUED)

- SPECIFYING A REQUIREMENTS-TYPE SUBCONTRACT FOR ALL R&D AND FOR A SPECIFIED VOLUME OF PRODUCTION
- EXPRESSLY EXCLUDING ANY TIME LIMIT ON THE NEGOTIATION OF A DEFINITIVE SUBCONTRACT
- SPECIFYING ENFORCEMENT AND/OR DAMAGE PROVISIONS SUCH AS SPECIFIC PERFORMANCE, BREACH DAMAGES, SUBSTANTIAL LIQUIDATED DAMAGES AND OR/ROYALTIES; AND
- REQUIRING PRE-NEGOTIATION OF AS MANY SUBCONTRACT TERMS AND CONDITIONS AS POSSIBLE

VIII. THE AGREEMENT

A. RECITALS

B. DEFINITIONS

1. THE “PROGRAM”
2. “PROCUREMENTS” UNDER THE PROGRAM
3. “TECHNICAL DATA”
4. “KNOW-HOW”
5. “PRIME CONTRACT”
6. “SUBCONTRACT”

VIII. THE AGREEMENT (CONTINUED)

C. FORMATION OF THE TEAM

D. ALLOCATING RESPONSIBILITY

1. STATEMENTS OF WORK

2. PROPOSAL EFFORT

a. TECHNICAL CONTROL

b. COST CONTROL

c. SCHEDULING

d. DUTY TO SUBMIT

VIII. THE AGREEMENT (CONTINUED)

3. NEGOTIATIONS WITH THE CUSTOMER

4. ALTERATIONS IN THE WORK

E. EFFECTING THE SUBCONTRACT

1. RELATIONSHIP OF SUBCONTRACTOR OFFER TO SUBCONTRACT PRICE

a. ESTOPPEL

b. EXPRESS PROVISIONS

c. MOST FAVORED CUSTOMER PROVISIONS

2. NEGOTIATING WINDOWS

VIII. THE AGREEMENT (CONTINUED)

- 3. PLANNING FOR FAILURE
- 4. CONTRACT TYPE
- 5. TERMINATION
- 6. “FLOW-DOWN” PROVISIONS
- 7. GENERAL TERMS AND CONDITIONS

VIII. THE AGREEMENT (CONTINUED)

8. GOVERNMENT APPROVAL

a. BEST EFFORTS

b. NON-INTERFERENCE

c. DOWNSTREAM “MAKE OR BUY” DECISIONS

d. INDEMNITY

VIII. THE AGREEMENT (CONTINUED)

9. TERMINATION FOR CONVENIENCE:

- **INSIST THAT THE T.A. WILL NOT CONTAIN A TFC CLAUSE OR IN THE ALTERNATIVE, A RESTRICTED TFC CLAUSE**
- **FOR EXAMPLE, IT WILL APPLY ONLY IF PRIME CONTRACT IS TERMINATED FOR CONVENIENCE.**

VIII. THE AGREEMENT (TERMINATION FOR CONVENIENCE) (CONTINUED)

PRIME CONTRACTOR WILL SEEK TO INCLUDE A BROADLY DRAFTED TFC CLAUSE

- FAILURE TO WIN AWARD OF PRIME CONTRACT
- WITHDRAWAL OF RFP BY GOVERNMENT
- CANCELLATION OF THE PROGRAM
- SUSPENSION, DEBARMENT OR PROPOSED DEBARMENT OF EITHER PARTY
- A DECISION BY EITHER PARTY NOT TO PURSUE THE PROGRAM OR A GIVEN PROCUREMENT

VIII. THE AGREEMENT (TERMINATION FOR CONVENIENCE) (CONTINUED)

- ELIMINATION OF THE SUBCONTRACTOR'S AREA OF INTEREST
- SIGNIFICANT CHANGES IN SCOPE OF WORK
- BANKRUPTCY OR INSOLVENCY
- GOVERNMENT DISAPPROVAL OF THE SUBCONTRACTOR OR OF THE SUBCONTRACTOR'S COST OR TECHNICAL PROPOSAL
- FAILURE TO AGREE ON TERMS AND CONDITIONS OF A SUBCONTRACT WITHIN A PRESCRIBED PERIOD

VIII. THE AGREEMENT (TERMINATION FOR CONVENIENCE)

- LOSS OF KEY EMPLOYEES BY A TEAM MEMBER
- AWARD OF AN IMPLEMENTING SUBCONTRACT
- IMPOSSIBILITY OR IMPRACTICABILITY OF PERFORMANCE
- MUTUAL AGREEMENT

VIII. THE AGREEMENT (CONTINUED)

I. INTELLECTUAL PROPERTY

1. CONTRIBUTIONS TO THE TEAM

2. THE EXCHANGE OF DATA

3. LIMITS ON USE

VIII. THE AGREEMENT (CONTINUED)

J. DAMAGES

K. DISPUTES

1. GOING TO COURT

2. ARBITRATION

IX. REALITY CHECK

- **SUPPOSE PRIME SAYS “TAKE IT OR LEAVE IT?”**

WHERE TO GO FOR MORE INFO?

- FEDERAL PUBLICATIONS (202) 337-7000
- YOUR ATTORNEY
- TADSBAT (800) 933-8483

###